

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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United States of America,

Case No. 2:15-cr-00192-KJD-PAL
No. 2:20-cv-01123-KJD

Plaintiff,

Order

V.

Marcus McFarland,

Defendant.

Presently before the Court is Movant's Motion to Vacate, Set Aside, or Correct Conviction and Sentence under 28 U.S.C. § 2255 (#40). The Government filed a Motion for Leave to Advise the Court of New Supreme Court Authority (#42). Movant responded in opposition (#43) to which the Government replied (#44).

I. Factual and Procedural Background

Marcus McFarland (“McFarland” or “Defendant”) was convicted, on his guilty plea, of unlawful possession of a firearm by a previously convicted felon. He now requests that the Court vacate his sentence under 28 U.S.C. § 2255, asserting that his indictment and subsequent conviction are invalid.

McFarland has a lengthy criminal history, dating back to 2000 at age 18. Over the next 15 years, McFarland was convicted of various offenses including drug possession, unlawful possession of drug paraphernalia, conspiracy to commit battery with a deadly weapon, battery, attempted possession of a stolen vehicle, attempted grand larceny, home invasion, tampering with evidence, and carrying a concealed weapon. (PSR). On his first felony conviction, in 2003, the state court sentenced him to 13-36 months in state prison and he spent more than a year in prison for that offense. Id. In 2007, McFarland was again sentenced to 14-72 months in prison for a second felony—home invasion. Id. He was paroled after serving over three years in prison.

1 Id.

2 In January 2016, McFarland pleaded guilty according to a plea agreement with the
 3 government, to unlawful possession of a firearm by a previously convicted felon. (#27). In the
 4 plea agreement, McFarland admitted that he knowingly possessed the firearm, and that when he
 5 did, he had been previously convicted of a crime punishable by a term of imprisonment
 6 exceeding one year. (#27, at 4).

7 In June 2016, this Court sentenced McFarland to 57 months of imprisonment followed by
 8 three years of supervised release. (#36/37). McFarland did not appeal, and his conviction became
 9 final on June 24, 2016.

10 On June 19, 2020, McFarland filed this motion to vacate, arguing that the indictment was
 11 defective because it “did not allege Mr. McFarland knew he had a prohibitive status at the time
 12 of possession,” and that “the defective indictment also stripped the Court of jurisdiction.” (#40,
 13 at 9). McFarland further alleges that the “defect” in his indictment violated his Fifth and Sixth
 14 Amendment rights. Id.

15 II. Legal Standard

16 28 U.S.C. § 2255 allows a federal prisoner to seek relief under four grounds: (1) “the
 17 sentence was imposed in violation of the Constitution or laws of the United States;” (2) “the
 18 court was without jurisdiction to impose such a sentence;” (3) “the sentence was in excess of the
 19 maximum authorized by law;” and (4) the sentence is “otherwise subject to collateral attack.” 28
 20 U.S.C. § 2255(a).

21 Under 18 U.S.C. § 922(g), it is “unlawful for any person” who falls within one of nine
 22 enumerated categories to “possess in or affecting commerce any firearm or ammunition.”
 23 Section 924(a)(2) sets out the penalties applicable to “[w]hich ever knowingly violates” § 922(g).
 24 Before June 2019, courts treated the knowledge requirement in § 924(a)(2) as applying only to
 25 the defendant’s possession of a firearm or ammunition, not to the fact that he fell within the
 26 relevant enumerated category. But on June 21, 2019, the Supreme Court issued its decision in
 27 Rehaf v. United States, 139 S. Ct. 2191 (2019), holding that a defendant’s knowledge “that he
 28 fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the

1 like)" is an element of a § 922(g) offense. *Id.* at 2194. This decision applies to all § 922(g)
 2 categories, including felons under § 922(g)(1). A felon is one who has been convicted of a crime
 3 punishable by more than one year of imprisonment.

4 In Rehaif, the Supreme Court stated:

5 The question here concerns the scope of the word "knowingly." Does it mean that the Government must prove that a defendant knew
 6 both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was
 7 a felon, an alien unlawfully in this country, or the like)? We hold
 8 that the word "knowingly" applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the
 9 Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status
 10 when he possessed it.

11 Id. Rehaif does not stand for the proposition that the government must prove the defendant
 12 knew his possession of the firearm was unlawful. Rehaif requires proof of the defendant's
 13 felonious status. So, in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the government
 14 must prove that (1) the defendant knew he possessed a firearm and that (2) he knew he belonged
 15 to the relevant category of persons barred from possessing a firearm. See id. at 2200. To hold
 16 otherwise would mean that pure ignorance of the United States Code was a sufficient defense.

17 The Supreme Court also recently held that "[i]n felon-in-possession cases, a Rehaif error is
 18 not a basis for plain-error relief unless the defendant first makes a sufficient argument or
 19 representation on appeal that he would have presented evidence at trial that he did not in fact
 20 know he was a felon." Greer v. United States, 141 S. Ct. 2090, 2093 (2021). The Court held that
 21 for the felons-in-possession in that case, they must have shown that had the Rehaif errors been
 22 correctly advised, there was a "reasonable possibility" they would have been acquitted or not have
 23 plead guilty. Id. The Court held that it was unlikely they would have carried that burden because
 24 both had been convicted of multiple felonies before and those "prior convictions are substantial
 25 evidence that they knew they were felons." Id. The Court also rejected the argument that a
 26 Rehaif error is a structural one that requires automatic vacatur and held that "Rehaif errors fit
 27 comfortably within the 'general rule' that 'a constitutional error does not automatically require
 28 reversal of a conviction.'" Id., quoting Arizona v. Fulminante, 499 U.S. 279, 306 (1991).

1 **III. Analysis**

2 McFarland asserts that in light of Rehaif, his sentence is unconstitutional and must be
 3 vacated because (1) the indictment failed to allege a cognizable crime against the United States
 4 and therefore stripped the Court of jurisdiction; (2) the grand jury was not required to find
 5 probable cause as per the defective indictment which violated his Fifth Amendment rights; and
 6 (3) McFarland was not informed of the nature and cause of the accusation which violated his
 7 Sixth Amendment rights. (#40, at 13-14).

8 The government argues that he is not entitled to an early release because a Rehaif error is not
 9 a basis for plain-error relief unless McFarland makes an argument that he would have presented
 10 evidence at trial that he did not know he was a felon. (#42, at 2).

11 **A. Jurisdiction**

12 McFarland argues that his indictment failed to describe the criminal conduct as per Rehaif,
 13 which constitutes a fatal defect and deprived the Court of jurisdiction. (#40, at 15). However, the
 14 Ninth Circuit has ruled on this identical argument, holding that “the indictment’s omission of the
 15 knowledge of status requirement did not deprive the district court of jurisdiction.” United States
 16 v. Espinoza, 816 Fed. Appx. 82, 84 (9th Cir. 2020). “The Supreme Court has explicitly rejected
 17 ‘the view that indictment omissions deprive a court of jurisdiction...’” and this holding applies
 18 where ‘an indictment fails to allege the specific intent required’ for a crime[.]” Id., quoting
 19 United States v. Cotton, 535 U.S. 625, 631 (2002), United States v. Velasco-Medina, 205 F.3d
 20 839, 845-46 (9th Cir. 2002). Therefore, the Court rejects McFarland’s argument that this Court
 21 lacked jurisdiction.

22 **B. Fifth Amendment Rights**

23 McFarland also argues that because of the insufficient indictment, his Fifth Amendment
 24 rights were violated, and his sentence should be vacated. (#40, at 18-19). “The Fifth
 25 Amendment’s grand jury requirement establishes the ‘substantial right to be tried only on
 26 charges presented in an indictment returned by a grand jury.’” United States v. Davis, 854 F.3d
 27 601, 603 (9th Cir. 2017), quoting United States v. Antonakeas, 255 F.3d 714, 721 (9th Cir.
 28 2001). McFarland asserts that the failure to include the Rehaif elements amounts to an

1 “indictment [that] describes lawful conduct” and that he should not have been tried based off this
 2 faulty indictment. (#40, at 18). He also argues that this was a structural error that does not require
 3 a showing of prejudice. *Id.* at 19.

4 “In this circuit an indictment missing an essential element that is properly challenged before
 5 trial *must* be dismissed.” United States v. Qazi, 975 F.3d 989, 991 (9th Cir. 2020). McFarland
 6 has not presented any evidence that he properly challenged his indictment before trial.

7 Further, the Supreme Court has held that a Rehaif error is not a structural one, so McFarland
 8 must show actual prejudice. In Greer, the Court explained that “[s]tructural errors are errors that
 9 affect the ‘entire conduct of the [proceeding] from beginning to end’ and consist of things like
 10 “the denial of counsel of choice, denial of self-representation, denial of a public trial, and failure
 11 to convey to a jury that guilt must be proved beyond a reasonable doubt.” Greer, 141 S. Ct., at
 12 2100. There, the Court held that “the omission of a single element from jury instructions or the
 13 omission of a required warning from a Rule 11 plea colloquy— are not structural because they do
 14 not ‘necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for
 15 determining guilt or innocence.’” *Id.*, quoting Neder v. United States, 527 U.S. 1, 9 (1999). The
 16 Court finds that here, the omission of the Rehaif requirement in the indictment does not amount
 17 to a structural error because it did not render McFarland’s legal proceedings fundamentally
 18 unfair or an unreliable vehicle for him deciding to plead guilty. As noted in Greer, “[i]f a person
 19 is a felon, he ordinarily knows he is a felon.” Greer, 141 S. Ct., at 2097. “Felony status is simply
 20 not the kind of thing that one forgets.” *Id.*, quoting United States v. Gary, 963 F.3d 420, 423 (4th
 21 Cir. 2020). McFarland has not made an argument that he did not know he was a felon, nor has he
 22 made a sufficient argument that the indictment truly did infect the entire judicial proceeding such
 23 that he would have changed his guilty plea.

24 **C. Sixth Amendment Rights**

25 McFarland makes a similar argument regarding his Sixth Amendment rights— that the
 26 indictment did not give him reasonable certainty of the nature of the accusation against him and
 27 that it inhibited his counsel’s ability to properly defend him. (#40, at 19-21). The Court does not
 28 find this convincing. Again, McFarland has not made any representations that he did not know of

1 his felonious status at the time he possessed the gun, and he has not shown in any way that it
 2 affected his guilty plea.

3 McFarland also asserts this was a structural error that entitles him to relief without showing
 4 prejudice. Id. at 21. However, as clarified in Greer and explained above, this was not a structural
 5 error. McFarland stipulated in his guilty plea that he had a handgun in his possession and that at
 6 the time of his possession he had been convicted of one or more criminal offenses punishable by
 7 imprisonment for over one year. (#27, at 4). Further, the Supreme Court reasoned that when a
 8 defendant considers pleading guilty for this charge, he will usually recognize that as a felon, a
 9 jury would find he knew he was a felon when he possessed the gun and would likely factor that
 10 in when making the decision. Greer, 141 S. Ct., at 2097. “In short, if a defendant was in fact a
 11 felon, it will be difficult for him to carry the burden on plain-error review of showing a
 12 ‘reasonable probability’ that, but for the Rehaif error, the outcome of the district court
 13 proceedings would have been different.” Id. McFarland has not made a showing that his Sixth
 14 Amendment rights were violated because of the Rehaif error and as per Greer, his sentence will
 15 not be vacated.

16 **IV. Certificate of Appealability**

17 Finally, the Court must deny a certificate of appealability. To proceed with an appeal,
 18 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P.
 19 22(b); 9th Cir. R. 22-1; Allen v. Ornoski, 435 F.3d 946, 950-951 (9th Cir. 2006); see also United
 20 States v. Mikels, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a
 21 substantial showing of the denial of a constitutional right” to warrant a certificate of
 22 appealability. Id.; 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).
 23 “The petitioner must demonstrate that reasonable jurists would find the district court’s
 24 assessment of the constitutional claims debatable or wrong.” Id. (quoting Slack, 529 U.S. at 484).
 25 To meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
 26 debatable among jurists of reason; that a court could resolve the issues differently; or that the
 27 questions are adequate to deserve encouragement to proceed further. Id. McFarland has not met
 28 his burden in demonstrating that there was any reasonable probability that he did not know that

1 he was a felon and, therefore, prohibited from possessing a firearm.

2 V. Conclusion

3 Accordingly, **IT IS HEREBY ORDERED** that Movant's Motion to Vacate, Set Aside, or
4 Correct Conviction and Sentence under 28 U.S.C. § 2255 (#40) is **DENIED**.

5 **IT IS FURTHER ORDERED** that the Clerk of the Court enter **JUDGMENT** for
6 Respondent and against Movant in the corresponding civil action, 2:20-cv-01123-KJD, and close
7 that case;

8 **IT IS FURTHER ORDERED** that Movant is **DENIED** a Certificate of Appealability.

9 Dated this 14th day of June 2023.



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11 Kent J. Dawson
12 United States District Judge
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